

No. 49526-1-II

COURT OF APPEALS, DIVISION TWO,

THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

MARTIN S. IVIE, Petitioner.

REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

Peter A. Camiel, WSBA # 12596
Catherine Chaney, WSBA # 21405
Camiel & Chaney P.S.
2101 Fourth Avenue, Suite 1900
Seattle, WA, 98121
(206) 624-1551

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I. INTRODUCTION

In his PRP, Mr. Ivie raises several challenges to his Mason County convictions. Many of those claims are based on extra-record facts, which Ivie properly set forth in sworn statements and records obtained from persons who did not testify at trial.

Ivie alleged that he received ineffective assistance of counsel because his trial lawyer failed to introduce medical testimony about the location and nature of his gunshot injuries, both to explain his condition during his post-arrest hospital interrogation, and, based on the fact that he was shot in the back, to rebut State witness' versions of how the shooting occurred. Ivie presented the sworn statement of his treating doctor and his medical records to prove that he received multiple gunshots to the back of his body and that he was in pain and under the influence of narcotic medication when interrogated. The State presented no evidence to rebut the doctor's declaration about the location of Mr. Ivie's wounds or his condition while being interrogated.

Ivie also alleged ineffective assistance of counsel in the failure to investigate and present expert testimony to rebut Deputy Adams testimony, the State's computer-generated depictions, and demonstrative photographs of Deputy Adams' purported location when Adams fired shots at Ivie. Ivie presented a sworn statement from a qualified crime scene reconstruction and firearm expert, Mr. Sweeney, proving that Ivie was not driving his truck toward Adams, but was driving away from Adams when Adams was shooting at Ivie. The State presented no evidence to rebut Sweeney's declaration but instead relies on Adams trial testimony.

Ivie also alleged the failure of his lawyer to investigate evidence proving Deputy Reed's lack of credibility and bias. He presented the sworn statement of witness Aaron Churchill, who Deputy Reed had attempted to recruit to give false testimony against Ivie. The State submitted a declaration from Reed denying these allegations.

Ivie also claimed his lawyer failed to object to improper evidence, failed to introduce impeaching veterinary testimony and evidence, and argue exculpatory facts to the jury, and failed to object to prosecutorial misconduct that occurred during closing argument.

Throughout its Response, the State disputes Ivie's claims and makes a variety of arguments regarding how this Court should construe Ivie's extra-record evidence, and then apply the law. The State's arguments are premature. This Court is not a fact-finding court. Instead, the State's arguments demonstrate the need for an evidentiary hearing, pursuant to RAP 16.11. Only after the facts are found, can this Court apply the law.

A. DISPUTED MATERIAL FACTS

Because the parties dispute material facts, this Court should either remand this PRP for an evidentiary hearing or for a decision on the merits. RAP 16.11 (b) ("If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.").

Once the petitioner makes this threshold showing, the court must then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. To rebut disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the court of appeals will direct the superior court to hold a reference hearing in order to resolve the factual questions.

Where Sgt. Adams was located when he first fired at Ivie, and whether Ivie's truck was headed at Adams, or away from Adams, when he fired, is disputed. The State disputes the facts presented in the declaration of petitioner's expert Kay Sweeney who refutes Adams' claimed position when he fired at Ivie. The State has not presented any sworn statements in support of its

disagreement with Sweeney's expert conclusions or Ivie's claim that his trial counsel failed to conduct an adequate investigation of the shooting.

The disputed facts include Ivie's physical and mental condition when police interrogated him at the hospital, and whether Ivie's trial counsel investigated this exculpatory medical evidence. The State argues Ivie's trial lawyer reasonably decided not to present such testimony, without sworn statements in support, or that it would not have been helpful. Dr. Ferrer's declaration demonstrates the exculpatory value of this evidence.

The disputed facts include the location of Ivie's gunshot wounds and whether his trial counsel failed to investigate this readily available medical evidence that proves Ivie was driving away from, and not toward, Adams.

The disputed facts include whether Reed attempted to suborn perjured testimony against Ivie by trying to convince Aaron Churchill to give false testimony. Ivie argues this should have been investigated by his lawyer. The State presents a declaration from Deputy Reed denying Churchill's claim. But the State presented no evidence to show that Ivie's trial counsel investigated this witness.

B. FAILURE TO INVESTIGATE AND PRESENT NECESSARY EXPERT TESTIMONY TO COUNTER THE STATE'S EVIDENCE REGARDING HOW THE SHOOTING OCCURRED

Sgt. Adams' Testimony v. Petitioner's Expert's Analysis

The State incorrectly suggests that petitioner misrepresents Sgt. Adams' trial testimony. The essence of Adams' testimony was that he fired at Ivie was because Ivie was driving directly at him, forcing Adams to both fire shots at Ivie and to jump out of the way. Adams testified that as Ivie accelerated towards him, he moved to his right and fired to prevent Ivie from hitting him. RP 316. The State introduced exhibits intended to bolster Adams' version of events, including Total Station Diagrams depicting the bullet trajectories and demonstrative photographs with different colored rods

to depict the purported bullet trajectories. At trial, the defense did nothing to challenge these exhibits.

The State quotes Adams' testimony, Response at 3, in part, leaving out critical testimony by Sgt. Adams. The State left out the following:

"And I fired at the driver in the vehicle at that point to try to get him to stop – stop driving and run me over." RP 316.

"At the time I fired the first – fired the first four rounds, that was 100% because I was sure I was going to get squished by the truck. I was surprised I didn't get hit." RP 320.

The State *now* asserts that Adams did not fire the first volley of shots until "after Ivie had passed him." Response at 7. That is not what Adams testified to at Ivie's trial. In addition, not only did Adams testify, as quoted above, but he told police investigators the following version of events:

That was the first volley I had when the truck was coming straight at me the only thing I was worried about was trying to avoid the front of the truck.
Suppl. App. 6 (IA 12-01 at 48).

He's basically, all's I see is up on top of me a set of headlights and a big grill barreling straight down on me. And I, I truly thought I was going to get squished. I mean I didn't I didn't think that I was going to be able to get out of the way in time.

Suppl. App. 2 (IA 12-01 at 24).

I was still I was still behind my vehicle and I was on that bank and I mean he was barreling at me. I know he saw me, he looked right at me.

Suppl. App. 3 (IA 12-01 24-25).

So as I'm moving sideways across the bank I put my rifle up unsighted and pointed it towards the driver's door and fired a volley of rounds at that point.

Suppl. App. 3-4 (IA 12-01 at 25-26, punctuation in original)¹.

¹ While Adams' statement to the Internal Affairs investigators was not admitted at trial, it was disclosed in discovery, and should have been presented to a defense expert as part of the analysis of Adams' version of events as well as used to cross examine Adams, which it was not.

Adams also told investigators that he was behind his patrol vehicle when Ivie began driving at him. “I had already had moved to the only retreat position there was which was behind my patrol vehicle.” Suppl. App. 5 (IA 12-01 at 46).

Adams also testified at trial:

Q: “And were you still moving laterally when you started to fire those first four shots?”

A: “Absolutely.”

RP 317-318.

Sweeney’s forensic analysis shows that Adams was actually “positioned in front of, and slightly to the left of the hood of his police vehicle and well to the left of the path of Ivie’s vehicle and approximately even with the driver’s door of Mr. Ivie’s truck” when Adams fired the first volley of shots. App. 4 (Sweeney Decl. ¶10). Yet Adams told the jury and investigators that he had been at the rear of his own vehicle when Ivie began driving at him and moved to the right just in time to avoid being hit. Petitioner’s forensic evidence shows in Figures 19 and 20 that Adams was standing safely in front of his own vehicle when he fired the first volley of shots. App. 24.

The State’s computer-generated diagrams, admitted as exhibits 47-51, depicted Adams’ shots fired at a shallow angle into the front driver’s side of the truck entering front to back and right to left and then broadside into the truck. State demonstrative photographic exhibits also demonstrated this purported trajectory using the colored rods inserted into the bullet holes in the truck. State’s exhibits 44-46; RP 220-222.

Ivie’s lawyer should have presented forensic evidence at trial that proves that Adams’ shots were fired well after Ivie’s truck had passed him, when he was in fact positioned at a significant distance away from the driver’s side of the truck. Moreover, Ivie was headed away from Adams, not towards him. Adams fired the shots both from broadside into the truck as it drove away from him and into the back of the truck from the left as proved by the bullets’ trajectory from back to

front and left to right. In particular, bullet defects 3 and 4 came from shots fired from well behind Ivie's truck, not from in front of and to the right of the truck as the State's diagrams and photographs depict. Sweeney notes: "At the time the bullets that created defects #3 and #4 were fired, Mr. Ivie's truck was over the embankment and well past Deputy Adams car." App. 5. This opinion directly contradicts the State's exhibit, commented on by Sweeney in Figure 9, App. 15, that shows the line of fire for bullets #3 and #4 coming from the front and slightly to the driver's side of Ivie's truck. Indeed, Figure 9 (which was the State's trial Exhibit 51) misleadingly shows bullet #4 being fired by Adams standing almost directly in front of the right front bumper of Ivie's truck. But those bullet defects, Sweeney notes, resulted from shots from a shooter positioned well to the right of the vehicle after it passed, Figure 19, and from well behind the vehicle, Figure 20. App. 24.

Petitioner's trial counsel did not conduct an adequate forensic investigation into how the shooting occurred because he failed to consult with a qualified expert to review the State's evidence including the accuracy of the Total Station Diagrams, as well as Adams' statements, including his statements to the internal affairs' investigators.

Petitioner has presented Sweeney's sworn statements to show that had the trial lawyer conducted a proper investigation, evidence could have been presented to challenge Adams' version of events and to discredit the State's misleading diagrams and demonstrative photographs of the purported bullet trajectories.

The State's Response also completely fails to address Sweeney's examination of the bullet hole defects in the driver's side of the truck that proves the shots that created defects 3 and 4 came from well behind Ivie's truck. Indeed, the State presents no counter-declaration contesting Sweeney's forensic conclusions.

Contrary to the State's assertion that Sweeney's conclusions are based solely on the location of the shell casings, Response at 7-8, his conclusions are based on the morphology of the bullet

defects in the driver's door as well as the location of the shell casings, the tire tracks, and debris shown in the State's own exhibits. Those defects included irregularly shaped holes, proving that the bullets, in shots 3 and 4, went from back to front, not front to back. App. at 5 (Sweeney Declaration ¶12).²

C. FAILURE TO PRESENT MEDICAL TESTIMONY AT THE 3.5 HEARING ABOUT IVIE'S CONDITION AT THE TIME OF THE HOSPITAL INTERROGATION

The State argues that this issue was raised and decided on direct review. It was not. This Court characterized the issue on direct review as: "the trial court erroneously admitted, for impeachment purposes, statements Ivie made to police while recovering from his wounds in the hospital." Court Opinion at p. 1. This Court also quoted the trial court finding that Ivie had presented no evidence of the exact nature, timing, or duration of the surgery or of the severity of his wounds other than his own testimony that he had been repeatedly shot, suffered a concussion, and was under the influence of morphine and Oxycontin. *Id.* at p. 12. On this issue this court noted that "Ivie presented no expert or medical testimony concerning his condition at the time or the effects of any drugs he had taken." *Id.* In the issue raised by Ivie in his SAG this court did not have Dr. Ferrer's declaration that "*if I had been served with a subpoena to testify at the trial, I*" would have appeared and testified.³ App. 53 (Ferrer Decl. ¶8).

Dr. Ferrer's testimony would have corroborated and elaborated upon Ivie's testimony that he was in pain and heavily medicated at the time he was interrogated. *Id.* (Ferrer Decl. ¶7). Ivie testified at the 3.5 hearing that he was told he was on morphine and Oxycontin, RP 552, that he was

² Sweeney describes the materials he reviewed:

"I was provided with crime scene and evidence photographs, computer generated diagrams prepared from use of the Total Station Mapping System, trial testimony, and witness statements and police reports from the Mason and Thurston County Sheriff's Office. I was also provided with a report prepared by a defense firearm consultant Marty Hayes. I was also provided with Mr. Ivie's medical records, photographs of his bandaged injuries, and his hospital x-rays."

³ Dr. Ferrer's supplemental sworn declaration makes clear that he was never contacted by Ivie's trial lawyer. Suppl. App. 9.

complaining about the pain, RP 552, that he was in a dream state, RP 553, and that he only vaguely remembered parts of the interrogation. RP 553. Ivie testified that upon hearing the recording of his voice during the interrogation he definitely believed he was under the influence of the narcotics. RP 544. Ivie’s trial counsel failed to use available evidence to corroborate Ivie’s testimony.

The trial judge in her decision regarding the admissibility of Ivie’s hospital statements referred to the “issue of the medication or—*assumed medication* of the defendant[.]” RP 560 (emphasis added), because trial counsel failed to present any medical testimony. Dr. Ferrer would have confirmed, as he does in his declaration, that Ivie was reporting severe pain on the day of his interrogation and was in fact administered morphine.⁴ App. 53 (Ferrer Decl. ¶7). Dr. Ferrer explains that it is difficult to obtain information from a person in Ivie’s condition (experiencing pain and under the influence of narcotic medication). *Id.* This would have addressed both this Court’s and the trial court’s concern that no expert or medical testimony had been presented about Ivie’s condition “or the affects of any drugs he had taken.” Court Opinion at p. 12.

D. FAILURE TO PRESENT MEDICAL TESTIMONY TO THE JURY TO EXPLAIN IVIE’S HOSPITAL INTERROGATION

The State argues that this is the same issue that was raised on direct and is simply “recasting it with a new theory.” Response at 17. This is a separate issue.⁵ The medical testimony was necessary not only as to the voluntariness of Ivie’s statements for purposes of admissibility, but also to explain to the jury what condition Ivie was in when he made the hospital statements to explain later inconsistencies in his testimony.

⁴ The trial court’s use of the phrase “assumed medication” indicates the trial court was not convinced that Mr. Ivie was in fact medicated with narcotics when he was interrogated.

⁵ Ivie did argue in his SAG that counsel was ineffective in failing to request a jury instruction required by CrR 3.5. This Court ruled that Ivie had not demonstrated prejudice to sustain this claim. Ivie did not then have, as he does now, a declaration from the medical doctor who treated his serious injuries to support his claim.

Defense counsel claimed he was unable to contact a doctor to testify at the CrR 3.5 hearing. On direct appeal this Court excused the lack of medical testimony because “it is not reasonable to expect defense counsel to have somehow scheduled needed experts to be ready to appear on two working days’ notice, which is what the trial court required.” Court Opinion at p. 22 This Court did not then know that Dr. Ferrer had never been subpoenaed or even contacted by the defense lawyer (the State has not presented any evidence to the contrary). Moreover, defense counsel had more time to subpoena and obtain medical testimony for the trial before the jury, after the 3.5 hearing. But he made no additional effort to do so.⁶ The 3.5 hearing began on Tuesday, July 3rd. The trial had started on June 26th. The trial court ruled that there was sufficient time to obtain a doctor. RP 566. Defense counsel never sought a continuance to subpoena the doctor to testify before the jury and never made an offer of proof about the doctor’s testimony. In essence, trial counsel abandoned this area of critical evidence.

E. FAILING TO PRESENT MEDICAL TESTIMONY ABOUT THE NATURE OF, AND LOCATION OF, IVIE’S GUNSHOT WOUNDS

The State grossly mischaracterizes Dr. Ferrer’s declaration about the location of Ivie’s wounds and suggests, erroneously, that some of the shots entered the front of his body and thus the doctor’s testimony may have been more harmful than helpful to Ivie. Response at 13. The State is claiming trial counsel’s failure to call Dr. Ferrer was strategic, but Dr. Ferrer never stated the shots entered the front of Ivie’s body. Dr. Ferrer described Ivie’s wounds:

It was my impression that Mr. Ivie had: (i) an open wound on the upper left back (ii) a left flank hematoma; (iii) a nickel-size wound on the left lower back draining blood; (iv) nickel-size wound on the right lower back; (v) a small pea-size wound on the left lower back draining blood; (vi) multiple wounds around the left forearm and elbow;

⁶ Defense counsel told the court on Tuesday, July 3 that “I called Tacoma General Hospital yesterday and got a recording. They didn’t get back to me until this morning. They were looking for the doctor. And I’ve not heard back from them. And I called them and I got a recording again. So I guess we’ll have to proceed without testimony from the doctor.” RP 555.

and (vii) scalp wound on the back of the head. Mr. Ivie's wounds were treated while he was at Tacoma General Hospital.

App. 52 (Ferrer Decl. ¶4). The only reference to the chest and mid-abdomen were references to CT and X-ray images of Ivie that showed that bullet fragments inside his chest and mid-abdomen. There were no entry wounds in the front of his chest or mid-abdomen. App. 52 (Ferrer Decl. ¶5).

With this mischaracterization cleared up, it is obvious that trial counsel's failure to introduce medical testimony and photographs demonstrating the location of Ivie's wounds that were entirely exculpatory was not strategic. The State's claim that "Counsel may have decided that Dr. Ferrer's testimony was potentially more harmful than helpful to Mr. Ivie's defense[.]" Response at 13, is meritless.

F. DEFENSE COUNSEL'S FAILURE TO SUPPORT IVIE'S CLAIM OF INNOCENCE AND TO REFUTE THE STATE'S EVIDENCE WITH RELEVANT MEDICAL EVIDENCE WAS DEFICIENT PERFORMANCE THAT PREJUDGED MR. IVIE

Mr. Foley's myopic approach to the value of the medical evidence deprived Mr. Ivie of a defense to the Assault First Degree charges. Mr. Foley apparently believed that the medical evidence was *only* relevant to the issue of whether Ivie's post-arrest hospital statement was voluntary and only useful at the CrR 3.5 hearing. It does not appear that he even considered the relevance of the medical testimony at trial. A competent attorney would have consulted with Ivie's treating physician well enough in advance of trial, and would then have made arrangement for the doctor to testify at trial. Ivie's trial lawyer never spoke with Dr. Ferrer. Suppl. App. 9.

If Foley had taken minimal steps to adequately consult with Ivie's doctor he would have learned about the location of Ivie's gunshot wounds, and about Ivie's physical and mental condition at the time he was interrogated at the hospital. Moreover, such inquiry would have demonstrated the relevance of the location of Ivie's gunshot wounds (all to the back-side of his body) to Adams' claim that Ivie was driving towards him and not away from him when he shot at Ivie. Counsel did not even

seek to admit the photographs of Ivie's back showing his bandaged wounds. App. 18. Finally, such inquiry would have demonstrated the need for medical testimony to provide a reason for the differences in Ivie's hospital statement and trial testimony to offset the impeachment value of any inconsistencies.

G. TRIAL COUNSEL'S FAILURE TO ARGUE BASIC EXCLUPATORY FACTS

The State posits that the location of Ivie's wounds "had absolutely nothing to do with any of the crimes....because all the crimes had already occurred before Sgt. Adams shot Ivie." Response at 22. The State argues that the location of Ivie's wounds was irrelevant. If Adams moved away from the front of Ivie's truck and began to fire as he was still moving laterally, as he claimed, then a jury could reasonably expect bullet defects in Ivie's truck from a front to back, not back to front trajectory. And, the jury could reasonably expect the bullet wounds to Ivie should have been to his front or left side, not all to the back of his body.

The State also suggests that telling the jury about Ivie's medical condition and ingestion of narcotic medication during the hospital interrogation would not demonstrate the statements were unreliable. This ignores common sense.

H. FAILURE TO OBJECT TO DETECTIVE SIMPER'S TESTIMONY

The State asserts that the failure to challenge Detective Simper's testimony about the Total Station Diagrams was trial strategy. Response at 23. The State concedes that "[c]ounsel could have objected to admission of the total station exhibits for technical reasons and possibly could have forced the State to call an additional witness in order to have the exhibits admitted." *Id.* at 24. Incredibly, the State then argues that "these exhibits were not central to the State's case, because Ivie had already completed the crime of assault in the first degree against SGT Adams when SGT Adams fired the gunshots depicted in the total station exhibits." *Id.* But at trial, the State spent considerable time presenting photographs and diagrams depicting bullet trajectory. Detective

Simper's testimony spans over 70 pages of the trial record. RP 193-264. In closing argument, the prosecutor told the jury that The Total Station diagrams "clearly show the path of Ivie's truck." RP 745. The prosecutor continued in this vein, telling the jurors "Mr. Ivie is contradicted by the total station images" RP 746. The prosecutor asked the jury to "look at the three images together—the total station images of the vehicle...." RP 746. The Total Station diagrams and the State's demonstrative photographs with the colored rods were inaccurate and misleading as to the trajectory of the shots fired by Adams, as Kay Sweeney notes in his report. App. 5.⁷ Defense counsel had a duty to object and failed to do so.

I. FAILURE TO INVESTIGATE LAY WITNESSES TO PROVE DEPUTY REED'S BIAS AGAINST IVIE

In responding to the claim concerning the failure to investigate lay witness Aaron Churchill, who has sworn that Deputy Reed tried to induce him to commit perjury against Ivie, the State presents the declaration of Deputy Reed and suggests he is more credible than Ivie and Churchill. Response at 25. The State does not present any declaration from the trial attorney or defense investigator to refute Ivie's sworn declaration that he told his lawyer about Churchill, or that the attorney investigated this issue, and made a strategic decision not to call Churchill. Indeed, Churchill stated he was never contacted by a defense lawyer or investigator prior to Ivie's trial. App. 122. Instead the State asks this Court to make a credibility finding between Ivie and Deputy Reed, which this Court may not do.

⁷ "Police photographs and diagrams depicting the trajectory of defects #3 and #4 included in my report at figures 6 and 9 are grossly inaccurate and completely contrary to the morphology of those two defects. The police photographs of the trajectory of defects #3 and #4 appear to show the trajectory as from front to back at a shallow angle when an examination of these defects clearly show that the bullets that created these defects came from back to front. Figures 12 and 13 of my report show the distinct characteristics of defects #3 and #4 which support my conclusion that the trajectory for these defects was from back to front and not front to back as the police demonstration and diagram depicts." App 5 (Sweeney Decl. ¶12).

The State also claims that Ivie's assertion that he told his lawyer and investigator about Aaron Churchill is uncorroborated. Response at 25. However, when Ivie was interviewed at the hospital he told the interrogating officers that "Church [sic] told me that, that he was (indistinguishable) meth and Reed told him he wouldn't do nothing about it if he'd just give him some information once in a while and then the next time he saw him, he asked him to testify in court that I was up there and he saw me cutting a maple tree up in Price Lake." Suppl. App. 7 (Ivie hospital transcript p. 15). Ivie also told the police investigators:

The only reason why I didn't sit there and mind Reed. The only reason why it happened in the first place is because Reed has treated me the way he's treated me, he' harassed me, he's falsely charged me, he's lied to try to condemn me, *he's tried to get false witnesses against me*, and all this can be documented....

Suppl. App. 8 (Ivie hospital transcript p. 18) (emphasis added). Ivie's statements about Deputy Reed and his attempt to suborn perjury through Churchill are right in the transcript of Ivie's hospital statement. Trial counsel should have investigated Ivie's statement and called this witness. Instead he never even talked to Churchill. His failure to call Aaron Churchill at Ivie's trial cannot be deemed tactical.

J. FAILURE TO INTRODUCE VETERINARY RECORDS OR THE TESTIMONY OF THE VETERINARIAN

The State disingenuously suggests that the only point of relevance for introducing evidence that Ivie had his dog with him when he was confronted by Deputy Reed "was to prove Ivie's assertion that his motive for resisting arrest, leading the police on a dangerous chase, and assaulting officers was that he wanted to take his dog home before police arrested him." Response at 10. The State fought hard at trial to prevent the jurors from learning about the vet records showing the dog was shot. The judge agreed to allow the evidence but Ivie's trial lawyer made no attempt to call the veterinary doctor. The actual purpose of the evidence was to attack the credibility of Reed and to bolster the credibility of Ivie. The trial court ruled that the evidence was admissible because "it goes

to the credibility of your client [Ivie].” RP 403. The State does not address the failure by trial counsel to introduce this evidence through the veterinarian, but instead argues it was not relevant despite the trial court’s ruling to the contrary.

K. THE STATEMENTS BY THE PROSECUTOR IN CLOSING ARGUMENT CANNOT BE EXCUSED AS PROPER REBUTTAL

The State argues that the disparaging statements by the prosecutor in the rebuttal closing argument that Foley wanted the jurors to ignore the evidence, were in proper response to the defense closing argument. Response at 31. Each of the offending statements by the prosecutor impugned the defense lawyer by stating that he wanted the jurors to ignore evidence. And each and every offending statement by the prosecutor called out the defense lawyer by name. Yet at no point in his closing argument did the defense lawyer make any such statement. The quote from defense counsel’s closing recited by the State is an argument that the reason Ivie was shot was because he was stealing wood, not assaulting officers. Response at 31. But the defense lawyer, in this same quote told the jurors “you look at all the evidence, and you weigh all the testimony you’ve heard...” RP 773-74.

The State apparently concedes that calling out defense counsel by name was improper. “Here, rather than mention defense counsel by name it would have been better....” Response at 32. Finally, the State argues that even if the comments were improper they were invited or provoked. But the State can point to no statement by defense counsel imploring the jury to ignore evidence. In fact, counsel said the opposite. But defense counsel never objected to these improper statements.

L. TRIAL COUNSEL’S PERFORMANCE WAS DEFICIENT

Trial counsel’s performance is deficient if it falls below a minimum objective standard of reasonableness. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). Competent counsel has a duty to conduct a reasonable investigation. *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The presumption of counsel’s competence can be overcome by showing a

failure to investigate: "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts and introduction of expert evidence." *Hinton v. Alabama*, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 106, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). Courts defer to a trial lawyer's decision against calling witnesses if that lawyer investigated the case and made an *informed* and reasonable decision against conducting a particular interview or calling a particular witness. *State v. Jones*, 183 Wn.2d 327, 340, 352 P.3d 776 (2015). "But courts will not defer to trial counsel's unformed or unreasonable failure to interview a witness." *Id.*

Failing to investigate readily available medical evidence that is relevant to developing an informed theory of the case can fall below an objectively reasonable standard. *See In re Brett*, 142 Wn.2d at 880; *State v. Fedoruk*, 184 Wn. App. 866, 883, 339 P.3d 233 (Div. 2 2014). Here, trial counsel's failure to obtain and present the readily available medical evidence was unreasonable and his failure to present this evidence caused prejudice to Ivie.

Although the State mischaracterizes Ivie's ineffective assistance of counsel claims, it does not refute the majority of Ivie's legal and factual premises. The State appears to argue that much of Mr. Foley's deficient performance was legitimate trial strategy and is, therefore, immune to judicial review. Response at 6 (failure to investigate expert witnesses), 11-18 (failure to obtain medical testimony about Ivie's bullet wounds and condition during his interrogation). The Washington State Supreme Court has held that "to provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Brett*, 142 Wn.2d at 878 (internal citations omitted) (granting personal restraint petition for ineffective assistance of counsel in part because "the only expert retained by the defense could not ... be used to support a defense theory"); *see also In re Personal Restraint of Maurice*, 79 Wn. App 544, 552, 903 P.2d 514 (Div. 3 1995) (granting the

personal restraint petition because counsel's performance was deficient in failing to conduct adequate pre-trial investigation). In *In re Brett* the court stated:

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

142 Wn.2d at 881 (citations omitted). Just as in *In re Brett*, the experts retained by Ivie's trial counsel did not support the defense theory that Ivie was driving away from and not toward Deputy Adams when Adams fired at Ivie.

M. IF MR. FOLEYS' FAILURE TO PRESENT THE TESTIMONY OF IVIE'S DOCTOR, A QUALIFIED FORENSIC EXPERT, AND WITNESS AARON CHURCHILL, WERE TACTICAL, THESE WERE UNREASONABLE TACTICAL DECISIONS THAT PREJUDICED MR. IVIE

Mr. Foley's failure to investigate, and to call appropriate lay and expert witnesses were not legitimate strategic decisions. In *Maurice*, the court granted relief for ineffective assistance of counsel, holding that "[t]he presumption of counsel's competence can be overcome ... by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena witnesses." 79 Wn. App. at 552 (citing *State v. Jury*, 19 Wn. App 256, 263-64, 576 P.2d 1302 (Div. 2), review denied, 90 Wn.2d 1006 (1978)). This Court, as in *Maurice*, should grant Mr. Ivie's personal restraint petition on the basis of ineffective assistance of counsel because his trial counsel failed to conduct a reasonable investigation of available defenses, to prepare adequately for trial or to subpoena witnesses. See also *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) ("A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Mindful of the deference we owe counsel's trial strategy, we nevertheless conclude that counsel's cursory investigation of the three possible alibi witnesses, and their subsequent failure to put them

on the stand, constitute deficient performance that was prejudicial to Lord's defense.") (internal quotations and citations omitted)).

N. IVIE WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE

The State's argument that Ivie has not established prejudice due to defense counsel's deficient performance is not supported by law or fact. To obtain relief on collateral review based on constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 671-72 (2004). "[I]f a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice." *In Re Personal Restraint of Crace*, 174 Wn.2d 835, 846-47 (2012). To prevail on an ineffective assistance claim, a petitioner must prove that (1) counsel's performance was deficient and (2) the petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

As to the first requirement, the petitioner must show counsel's performance fell below "an objective standard of reasonableness." *Id.* at 688. *Reasonable* tactical choices do not constitute deficient performance. *Id.* at 689 (emphasis added). Strategic decisions are entitled to deference only if made after an adequate investigation of law or facts or are supported by reasonable professional judgments. *Id.* at 690-91.

As to the second requirement, the petitioner must show by a "reasonable probability" – less than a more likely than not standard – that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Without Ivie's doctor, the defense could not effectively respond to the inconsistencies between Ivie's hospital statement and his trial testimony, nor show a jury the location of Ivie's injuries to refute Adams version of events. Without both the doctor's testimony and a competent

crime scene/firearm expert the defense could not corroborate Ivie's trial testimony that he was driving away from Deputy Adams and not toward him.

Without a competent crime-scene forensic expert, the defense could not challenge Deputy Adams' version of the shooting or challenge the State's demonstrative exhibits. The failure to object to the incompetent State testimony and exhibits about the shooting left the State's version of events unchallenged.

Without the testimony and records from the Veterinarian and from Churchill the defense could not prove the bias and lack of credibility of Deputy Reed.

O. CUMULATIVE INEFFECTIVE ASSISTANCE OF COUNSEL

These instances of ineffective assistance, taken together, cumulatively deprived Ivie of a fair trial. The cumulative effects of errors may require reversal, even if each error on its own would otherwise be considered harmless. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The failure to consult and have Ivie's trauma surgeon testify in this case provides a sufficient basis on its own to reverse. The failure to consult with and to call a crime scene/firearm expert to counter the state's ballistic evidence was an equally fatal error. Defense counsel's failure to call Mr. Churchill to prove Deputy Reed's bias against Ivie allowed Reed's credibility to go unchallenged. The failure to object to the improperly admitted Total Station diagrams and the failure to call the veterinarian and to introduce the veterinarian's records compounded this prejudice. But for these errors by counsel, there is a reasonable probability that the outcome of the trial would have been different.

P. THE STATE INCORRECTLY ARGUES THAT IVIE IS BARRED FROM RAISING INEFFECTIVE ASSISTANCE OF COUNSEL ON COLLATERAL REVIEW

The State vastly overstates the re-litigation doctrine. Response at 12. This Court is not precluded from examining any of Ivie's claims of error in this PRP because in each case, the claim

is both different from the claim raised on direct appeal, and also because Ivie supports his claims in this PRP with extra-record evidence.

Under Washington law, a personal restraint petitioner may raise an issue decided on direct appeal if the "interests of justice require relitigation." *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). Washington courts have never precisely defined the "interests of justice" standard. Rather, they have adopted the intentionally loose test originally set out by the U.S. Supreme Court in *Sanders v. United States*, 373 U.S. 1 (1963). See *In re Taylor*, 105 Wn.2d at 688-89, quoting *Sanders*, 373 U.S. at 17 ("ends of justice" standard "cannot be too finely particularized"). The "ends of justice" standard "is clearly not a 'good cause' standard." *In re Personal Restraint of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Consequently, Washington courts have re-examined claims whenever a petitioner raises "new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the defendant." *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). There does not appear to be any Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim because the ends of justice did not favor re-litigation. In fact, *In Re Taylor* explains that the ends of justice will always be satisfied whenever a petitioner "is actually prejudiced by the error." 105 Wn.2d at 688.

In addition, state courts have found the "ends of justice" to be satisfied when a petitioner presents additional allegations in support of the same legal claim made on direct appeal, when he presents the same allegations but improves his constitutional analysis, and when the court was simply wrong the first time around. For example, in *In re Brett*, 142 Wn.2d 868, the state court found trial counsel ineffective in failing to present expert testimony concerning the defendant's medical and mental conditions. Brett had previously argued on direct appeal that trial counsel were

ineffective, and had specifically relied on counsel's failure to explore Brett's fetal alcohol syndrome. *Id.* at 883 (conc. op. of Talmadge, J.) *citing State v. Brett*, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). *See also, State v. Brett*, 126 Wn.2d at 198-200. Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief. *In re Brett*, 142 Wash.2d 868, 16 P.3d 601 (2001).

In *In Re the Personal Restraint of Percer*, 111 Wn. App. 843, 47 P.3d 576 (Div. 3 2002), the Washington Court of Appeals permitted the petitioner to re-litigate an issue simply because the Court was convinced it had made a mistake in the direct appeal. The Washington Supreme Court reversed on the merits, but agreed that the Court of Appeals had properly reviewed the claim. *Percer*, 150 Wn.2d 41, at 54 (2003).

The State ignores this case law. The State argues that a defendant who claims ineffective assistance of counsel on direct appeal, no matter how limited the claim, is barred from raising any claim of ineffectiveness in a PRP. Response at 12. The State makes this argument even where the factual predicate in the PRP differs from the direct appeal or was not available at that time.

While Ivie in his *pro se* Supplemental Grounds for Appeal did raise the issue of ineffective assistance of counsel, he is not precluded from raising this claim on collateral review because the claim in this PRP raises a different theory of ineffective assistance of counsel. The ineffective assistance claim raised here constitutes such a new claim and may properly be considered. *See In re Personal Restraint of Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015). In *Khan* the State argued that Khan was procedurally barred from raising this argument because he raised ineffective assistance of counsel on direct review. But Khan did not argue on direct review that counsel was ineffective for failing to obtain an interpreter; he argued that his counsel was ineffective for failing to object to testimony that his stepdaughter would suffer adverse social consequences for coming forward with her allegations and for failing to object to alleged prosecutorial misconduct. *Khan*, 184 Wn.2d 689

(2009). (In *Khan* the Washington Supreme Court granted a reference hearing on the issue of the failure to obtain an interpreter. *Khan*, 849 P.2d at 584. The "ends of justice" standard "is clearly not a 'good cause' standard." *In re Personal Restraint of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Q. THIS COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER TRIAL COUNSEL WAS INEFFECTIVE

In order to merit an evidentiary hearing, a petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re Personal Restraint Petition of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Ivie has done so, submitting sworn declarations and supporting documentation. Once the petitioner makes this threshold showing then, if the State disputes any of the new facts, it must do so with its own *sworn* declarations. If the parties' documentary evidence establishes the existence of material and disputed facts, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions. A hearing is likewise not a vehicle to determine whether the State can produce actual evidence to dispute Petitioner's facts.

In this case, the requisite disputed material facts exist. This Court is not permitted to sort through those facts, accepting some and rejecting others. Instead, that responsibility must be passed to a trial court where a full and fair hearing can be conducted; where the parties are entitled to discovery; and where witnesses will testify. RAP 16.11-16.13.

II. CONCLUSION

For the all the foregoing reasons, Martin Ivie respectfully asks this Court to vacate his conviction. In the alternative, he asks this Court to order discovery and an evidentiary hearing to resolve any factual disputes about Mr. Ivie's unlawful restraint.

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Respectfully submitted this 21st day of March 2017.

s/Peter A. Camiel

Peter A. Camiel, WSBA # 12596

s/Catherine A. Chaney

Catherine A. Chaney, WSBA # 21405
Attorneys for Petitioner Martin S. Ivie

No. 49526-1-II

COURT OF APPEALS, DIVISION II,
THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
MARTIN S. IVIE, Petitioner.

**SUPPLEMENTAL APPENDIX TO
REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION**

Peter A. Camiel, WSBA # 12596
Catherine Chaney, WSBA # 21405
Camiel & Chaney P.S.
2101 Fourth Avenue, Suite 1900
Seattle, WA, 98121
(206) 624-1551

SUPPLEMENTAL APPENDIX

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CERTIFICATE OF TRANSCRIPTION

I hereby certify that I, Heidi Cook, transcribed the foregoing STATEMENT from the taped recording and reduced same to type written form under my direction and control.

I certify that I have no interest in the event of the action, nor am I kin to any of the parties.

DATED: 2/27/2012

A handwritten signature in cursive script that reads "Heidi Cook".

**Heidi Cook
HC Transcription Services
PO Box 190
Electric City, WA 99123
509-631-1725
HCTranscription@q.com**

In re Ivie, Suppl. App. 1

DETECTIVE
GARDNER:

OKAY THIS'LL BE THE STATEMENT OF SERGEANT TRAVIS ADAMS, DATE OF BIRTH OF EIGHT TWENTY-SIX OF NINETEEN SEVENTY-ONE. THIS IS UH REFERENCE INTERNAL AFFAIRS INVESTIGATION TWELVE DASH ZERO ONE. THE DATE TODAY IS TWELVE TWENTY-FOUR TWO THOUSAND-TWELVE. TIME NOW BY MY WATCH IS EXACTLY TWELVE NOON. MY NAME IS DETECTIVE GARDNER G-A-R-D-N-E-R WITH THE MASON COUNTY SHERIFF'S OFFICE. THIS STATEMENT IS BEING RECORDED AT THE MASON COUNTY SHERIFF'S OFFICE IN SHELTON WASHINGTON. THE FOLLOWING PEOPLE PRESENT IN THE ROOM FOR THE INTERVIEW WILL BE SERGEANT ADAMS, SYD VINNEDGE AND THAT'S S-Y-D V-I-N-N-E-D-G-E, DETECTIVE PITTMAN P-I-T-T-M-A-N, AND OF COURSE MYSELF. ALSO PRESENT IN THE ROOM WILL BE MICHAEL SERGEANT UH GUILD REPRESENTATIVE AND CHIEF OSTERHOUT WHO WILL BE GIVING THE INSUBORDINATION WARNING. SO BEFORE WE GET STARTED WITH THAT UM TRAVIS COULD YOU PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE RECORD?

SGT. ADAMS: TRAVIS O. ADAMS, A-D-A-M-S.

DETECTIVE
GARDNER:

AND DO YOU UNDERSTAND THIS STATEMENT IS BEING RECORDED?

SGT. ADAMS: YES I DO.

DETECTIVE
GARDNER:

AND DO I HAVE YOUR PERMISSION TO DO SO?

SGT. ADAMS: YES YOU DO.

DETECTIVE
GARDNER:

OKAY AND SYD YOU UNDERSTAND THIS IS BEING RECORDED?

VINNEDGE: YES.

DETECTIVE
GARDNER:

AND WE HAVE YOUR PERMISSION TO RECORD YOUR VOICE?

VINNEDGE: YES.

DETECTIVE
GARDNER:

OKAY. AT THIS TIME UH CHIEF OSTERHOUT WOULD YOU PLEASE READ THE INSUBORDINATION WARNING?

CHIEF

OSTERHOUT: OKAY, SERGEANT TRAVIS ADAMS YOU'RE ABOUT TO BE QUESTIONED AS FAR AS AN OFFICIAL ADMINISTRATIVE INVESTIGATION BY THE MASON COUNTY SHERIFF'S OFFICE. YOU'LL BE ASKED SPECIFIC QUESTIONS THAT WILL RELATE DIRECTLY SPECIFICALLY AND NARROWLY TO THE PERFORMANCE OF YOUR OFFICIAL DUTIES FOR FITNESS AS AN EMPLOYEE OF THIS AGENCY. THE RESPONSES MADE IN THIS INTERVIEW CANNOT BE USED AGAINST YOU IN A FUTURE CRIMINAL PROCEEDING. ALL THE INFORMATION IN THIS CASE IS CONFIDENTIAL AND EXCEPT AS MANDATED BY LAW WILL BE RELEASED ONLY TO PROPER AUTHORITIES. YOU'RE ORDERED AND REQUIRED TO ANSWER ALL QUESTIONS FULLY, TRUTHFULLY, AND TO THE BEST OF YOUR KNOWLEDGE. IF YOU REFUSE TO ANSWER QUESTIONS SPECIFICALLY DIRECTED AND NARROWLY RELATED TO THE PERFORMANCE OF YOUR OFFICIAL DUTIES YOU'LL BE SUBJECT TO TO DEPARTMENTAL CHARGES THAT WILL RESULT IN DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION. YOU'LL BE ALLOWED REASONABLE BREAKS AND AT REASONABLE TIMES FOR PERSONAL NECESSITIES. ALLEGATIONS TO WHICH YOU ARE BEING DIRECTED TO RESPOND ARE AS FOLLOWS. ALLEGATION NUMBER ONE THE ABOVE NAMED EMPLOYEE ALLEGEDLY ENGAGED IN THE USE OF DEADLY FORCE WHILE ATTEMPTING TO APPREHEND A FELONY SUSPECT. SERGEANT ADAMS DISCHARGED HIS HIS DUTY RIFLE STRIKING THE SUSPECT. (INAUDIBLE).

DETECTIVE

GARDNER: YEAH AT THIS POINT WE'LL GO AHEAD AND UH ACKNOWLEDGE UH WITH SIGNATURES THERE. AND JUST FOR THE RECORD WE MADE UH TWO COPIES SO WE'LL NEED DUAL SEPARATE SIGNATURES ON THOSE FOR EVERYBODY INVOLVED.

SGT. ADAMS: TWENTY-FOURTH?

DETECTIVE

GARDNER: TWENTY-FOURTH YES SIR. CHIEF. THANKS. (INAUDIBLE). ALRIGHTY.

CHIEF

OSTERHOUT: YOU HAVE ANYTHING ELSE (INAUDIBLE)?

DETECTIVE

GARDNER: CHIEF YOU CAN BE EXCUSED IF YOU'D LIKE SIR.

In re Ivie, Suppl. App. 3

CHIEF
OSTERHOUT: KAY.

DETECTIVE
GARDNER: THANK YOU VERY MUCH.

CHIEF
OSTERHOUT: BYE.

DETECTIVE
GARDNER: OKAY. ALRIGHT TRAVIS UM DO ME A FAVOR AND JUST I'D LIKE YOU JUST TO GO AHEAD AND IDENTIFY YOUR CURRENT RANK WITH THE DEPARTMENT UM HOW LONG YOU'VE BEEN HERE, UM AND THEN JUST MAYBE GO OVER SOME OF YOUR ASSIGNMENTS YOUR (INAUDIBLE) ASSIGNMENTS THAT YOU'RE CURRENTLY INVOLVED WITH WITH THE DEPARTMENT.

SGT. ADAMS: UM CURRENTLY A SERGEANT WITH THE SHERIFF'S OFFICE I'VE BEEN A SERGEANT SINCE TWO THOUSAND AND SIX. UM I'VE BEEN WITH THE DEPARTMENT, STARTED AS A RESERVE IN NINETEEN NINETY-FIVE AND WAS HIRED ON FULL-TIME IN NINETEEN NINETY-SIX.

DETECTIVE
GARDNER: UM, HM.

SGT. ADAMS: UH CURRENTLY I'M ASSIGNED TO PATROL.

DETECTIVE
GARDNER: UM, HM.

SGT. ADAMS: I'M ALSO IN CHARGE OF THE DEFENSIVE TACTICS PROGRAM FOR THE DEPARTMENT. UM I'M A MASTER INSTRUCTOR THROUGH CJTC IN DEFENSIVE TACTICS. UM I'M ALSO IN CHARGE OF THE DEPARTMENT'S MULTI-JURISDICTIONAL SWAT TEAM.

DETECTIVE
GARDNER: UM, HM.

SGT. ADAMS: AND VARIOUS OTHER DUTIES AS ASSIGNED.

DETECTIVE
GARDNER: OKAY UNDER THE SWAT MISSIONS YOU'RE THE TEAM LEADER WOULD THAT BE A UH A PROPER TERMINOLOGY?

SGT. ADAMS: YES.

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DETECTIVE
GARDNER: SO YOU'RE ALSO A PRACTICING MEMBER WITH THE TEAM NOT
JUST AS ADMINISTRATOR?

SGT. ADAMS: THAT'S CORRECT YES.

DETECTIVE
GARDNER: OKAY. OKAY ANYTHING ELSE? NOT THAT THAT'S NOT ENOUGH
BUT.

SGT. ADAMS: NOTHING THAT'S UH COMES TO MIND.

DETECTIVE
GARDNER: OKAY GREAT. AND UH ON FEBRUARY NINTH OF TWO THOUSAND-
TWELVE UH YOUR ASSIGNMENT WAS THE PATROL SERGEANT AT
THAT POINT?

SGT. ADAMS: YES.

DETECTIVE
GARDNER: AND YOU WERE RUNNING THE SHIFT IS THAT CORRECT?

SGT. ADAMS: YES.

DETECTIVE
GARDNER: OKAY. UM HAVE YOU HAD A CHANCE TO REVIEW POLICY ELEVEN
O ONE USE OF FORCE?

SGT. ADAMS: YES.

DETECTIVE
GARDNER: OKAY.

SGT. ADAMS: (INAUDIBLE).

DETECTIVE
GARDNER: ALRIGHT AND JUST FOR THE RECORD A COPIES BEEN PROVIDED
FOR YOU JUST IN CASE YOU NEED TO REFERENCE THAT AT THIS
POINT. UM ON THE NIGHT OF FEBRUARY NINTH UH COULD YOU
TELL ME HOW YOU BECAME APPRAISED OF THE SITUATION UP IN
LAKE CUSHMAN AREA WITH DEPUTY REED?

SGT. ADAMS: SURE. ACTUALLY IT WOULD START THE NIGHT BEFORE.

DETECTIVE
GARDNER: OKAY.

SGT. ADAMS: UH THE THE PREVIOUS NIGHT ON THE EIGHTH I HAD ACTUALLY BEEN UP I WENT UP TO LAKE CUSHMAN TO TALK TO DEPUTY REED JUST.

DETECTIVE
GARDNER: UM, HM.

SGT. ADAMS: I I GO UP THERE EVERY ONCE IN A WHILE TO SEE HOW HE'S HOW HE'S DOING AND WHAT'S GOING ON UP IN THE LAKE CUSHMAN AREA. I CONTACTED HIM UP THERE AT THE MAINTENANCE OFFICE AND HE TOLD ME THAT HE WAS HE HAD BEEN INVESTIGATING SOME UM WOOD THEFTS IN THE AREA.

DETECTIVE
GARDNER: UM, HM.

SGT. ADAMS: THAT HE WAS KINDA HANGING OUT THERE LISTENING TO HEAR IF HE HEARD CHAINSAWS OR ANYTHING BASED ON THE LOCATION THAT HE WAS AT. AND HE TOLD ME THAT THE THEFT HAD BEEN GOING ON FOR A WHILE AND BUT HE WAS HAVING A HARD TIME CATCHING THE PERSON INVOLVED. HE BELIEVED THAT THE THE PERSON INVOLVED WAS UH MARTIN IVY SOMEBODY WHO WE'VE HAD LOTS OF CONTACTS WITH IN THE PAST FOR SIMILAR TYPES OF THEFTS AND OTHER PROBLEMS. UM HE TOLD ME AT THAT TIME THAT UH NOT ONLY DID HE BELIEVE MARTIN IVY WAS INVOLVED IN THE WOOD THEFTS BUT ALSO THAT HE HAD A COUPLE FELONY WARRANTS AND THAT UH HE WAS ACTIVELY SEEKING HIM FOR THOSE WARRANTS AS WELL.

DETECTIVE
GARDNER: OKAY.

SGT. ADAMS: UH THE THE NEXT DAY UM WHEN I CAME IN TO WORK I WAS BRIEFED BY THE OUTGOING SHIFT SERGEANT SERGEANT VAUDEVILLE THAT DEPUTY REED HAD FOUND THE LOCATION WHERE THE CURRENT TREE THEFTS WERE OCCURRING. UH HE HE GAVE ME A VERBAL DESCRIPTION OF WHERE DEPUTY REED WAS AT, ADVISED ME THAT DEPUTY REED WAS GONNA BE STAKING OUT THAT LOCATION TO SEE IF TO SEE IF THE SUSPECT RETURNED THERE.

DETECTIVE
GARDNER: OKAY.

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1 Q1 That have been kinda giving you (indistinguishable)

2 A Reed. Reed. He's got (indistinguishable). How about this, Reed asked, uh, a guy in
3 Cushman, see, false testify against me. For sure. On the maple tree, tried to bust me on
4 that. And I didn't cut down...

5 Q1 And this, this (indistinguishable)...

6 A ... (indistinguishable) maple tree down here.

7 ...previous case you were telling us about?

8 A Yeah. Tried to, after, after I outran him, he had a hard-on for me so, so much he was up
9 in the area of (sounds like) Price Lake looking for me on his days off because I was
10 nare'd on me, I was cutting a tree down, and I didn't cut the tree down, the guy that told
11 me is the one that cut the tree down and raped the trees. I was up there with his partner
12 helping him with firewood originally and, and, uh, anyway, I found out all that, and
13 found out through, uh, Church, Aaron Church that, that, he told me that, that he wa
14 (indistinguishable) meth and Reed told him he wouldn't do nothing about it if he'd jus
15 give him some information once in a while, and then the next time he saw him, he asked
16 him to, to testify in court that I was up there and he saw me cutting a maple tree up in
17 Price Lake.

18 Q1 Okay.

19 A And that's the truth, I told (indistinguishable), well, you know, (indistinguishable), don't
20 tell him that, you know, he, I gotta live here still.

21 Q1 You, you mentioned the last time that, uh, someone else had cut the tree down, um, and
22 you mentioned that this time too. Do you know who cut the tree down last time?

23 A There's a lot, there's a lot of tree raper up around there.

24 Q1 Okay.

25 A Yeah.

26 Q1 But you're saying you did not?

27 A No.

28 Q1 You were just merely cutting it up?

29 A Cleaning up the area, I, I do that.

30 Q1 Okay.

31 A You know, dead (indistinguishable)

32 Q You're, you're saying you're looking for saw wood, is that what you cut,
33 (indistinguishable) wood?

34 A Well, it's a freshly cut tree so if it's got any music wood in it, you know, you don't, you
35 don't know, I know what it is so you try to make money on it, sure, rather than cut it up
36 for firewood.

37 Q Did you have per-, did you get permission to, to harvest that tree or to-

38 A No.

1 happened. But I'm sure that's what they're going to say. What choice they have
2 (indistinguishable) asshole shot me, you know, and I can still die, you know, I'm not
3 outta the, I'm not outta it yet. I got two bullets in me, man. Right now. They probably
4 can't get 'em out. That's how lucky I am to be here. One hit my head, for Christ's sakes.
5 And I, I (indistinguishable). What would happen then? I'd been dead. And they would
6 have lied, put their little stories together, and got away with it scot-free, huh. For what?
7 What's the crime, what's the big deal? There's nobody roundabout but Reed, that guy
8 and me, I mean, unbelievable

9 Q You said you'd been charged with eluding before, right?

10 A Reed to, to charge me with you name it.

11 Q So you know what that charge is, correct?

12 A It's evading, eluding, whatever he tried to charge with, it didn't work.

13 Q Do you consider...

14 A (Indistinguishable)

15 Q ...do you consider you not stopping for the red and blue lights last night eluding?

16 A No. How am I eluding when they know where I live and they know where I'm going?

17 Q Well, eluding is, is failing to stop for a-

18 A Well, you have a certain time to stop, I wanted to get to my driveway.

19 Q And driving recklessly.

20 A I wasn't driving recklessly. He was. I didn't, I didn't point my vehicle at him, I didn't
21 block his road.

22 Q Do you have anything else you want to add?

23 A Sounds to me like you're on their side. I think I've added enough.

24 Q This will conclude the taped statement.

25 A You think that's okay for him to shoot me like that...

26 Q Time now is-

27 A ...even if I was eluding. Let's say I was eluding, you think that's okay for him to shoot
28 me? Come on. I was, I was and I wasn't. I mean, I was, I told him where I was going, I
29 told Reed where I was going, I told him what I was doing, and that I would be up there,
30 and it wouldn't have been a problem. They could have driven up there, and I would do
31 just like I always have and, and always will, you know. Not, not resist arrest or anything
32 else. But he just, it was uncalled for. The only reason why I didn't sit there and mind
33 Reed, the only reason why it happened in the first place is because Reed has treated me
34 the way he's treated me, he's harassed me, he's falsely charged me, he's lied to try to
35 condemn me, he's tried to get false witnesses against me, and all this can be documented
36 Reed out-, ought to lose his job and be charged too (indistinguishable)

37 Q Okay.

38 A And maybe they will. If the truth gets out.

1
2
3
4
5
6 IN THE SUPERIOR COURT OF WASHINGTON
7 FOR MASON COUNTY

8 State of Washington.

Case No.: 12-1-00064-6

9 Respondent/Plaintiff

10 v.

SUPPLEMENTAL DECLARATION OF
THOMAS FERRER, M.D.

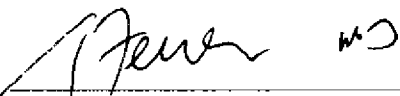
11 Martin S. Ivie.

12 Petitioner/Defendant
13
14

15 I declare under penalty of perjury under the laws of the state of Washington that the
16 following is true and correct.

17
18 I never spoke to or otherwise communicated with anyone who claimed to be an attorney
19 for Mr. Ivie, or who I understood to be an attorney for Mr. Ivie, until I spoke with Catherine
20 Chaney in 2016.

21 DATED this 16 day of March, 2017.

22
23 

24 Thomas Ferrer, M.D.
25
26

SUPPLEMENTAL DECLARATION OF THOMAS FERRER,
M.D. - 1

CAMPBELL & CHANEY, P.S.
2101 FOURTH AVENUE E, SUITE 1900
SEATTLE, WA 98121-2315
(206) 621-1551

CAMIEL & CHANEY, P.S.
March 21, 2017 - 10:15 AM
Transmittal Letter

Document Uploaded: 4-prp2-495261-Reply.pdf

Case Name: In Re Personal Restraint of Martin S. Ivie

Court of Appeals Case Number: 49526-1

Is this a Personal Restraint Petition? ☒ Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

☒ Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

The Supplemental Appendix is attached to the Reply brief.

Sender Name: Catherins Chaney - Email: catherine@camielchaney.com

A copy of this document has been emailed to the following addresses:

petercamiel@yahoo.com

timh@co.wa.mason.us